TRIO BINA SDN. BHD.

v.

BIJAYA CORP. SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[COMPANIES WINDING-UP NO. 28-5-89]
14 DECEMBER 1989

COMPANY LAW: *Winding-up - Acknowledgment of existing debt - Application for stay - Appointment of arbitrator - Work performed not to satisfaction - Tangible assets valued in excess of debt - Companies Act 1965, s. 218.*

The respondent had two different contracts with the petitioner to build houses and shop-houses. A sum of RM697,508.86 became long overdue for work done. But no payment was forthcoming. By letters dated 8 September 1987 and 26 April 1989 the respondent confirmed owing this amount. The respondent filed an originating summons in the High Court at Kuala Lumpur to appoint an arbitrator. That application was dismissed. The respondent further filed an application to stay the winding-up petition on the ground that an application for appointment of arbitrator was pending in the High Court at Kuala Lumpur and that the work executed by the petitioner was not to the satisfaction of the respondent.

Held:

[1] There was a categoric acknowledgment of an existing debt by the respondent and there was no suggestion whatsoever at the material time that the work was not to the satisfaction of the respondent.

[2] The admission of debt to the arbitrator confirms that there was no genuine dispute to be referred to arbitration and the money had to be paid.

[3] To say that the respondent had tangible assets valued in excess of its debts is to miss the point. Winding-up orders are made precisely because the company's liquidity problems do not permit the payment of its debts as and when they fell due.

[Order in terms of the petition to wind-up with costs.]

Legislation referred to:
Companies Act 1965, s. 218

For the petitioner - Gill; M/s. Gill & Tang
For the respondent - G.T. Rajan; M/s. G.T. Rajan & Co.

JUDGMENT

Mahadev Shankar J:

This is a petition by Trio Bina Sdn. Bhd. (Trio) to wind-up Bijaya Corp. Sdn. Bhd. (Bijaya), on the ground that Bijaya is unable to pay its debts. At the hearing there was an application by Bijaya to stay the petition. I dismissed the application and ordered Bijaya to be wound-up. My reasons now follow.

On 20 September 1986 Bijaya entered into a building contract with Trio for the construction of 64 units of double-storey terrace houses in Klang in a housing scheme known as Taman Bijaya (the first contract). This contract had a face value of just over RM3 million. The same

day the parties entered into a second contract for 16 units of a 3-storey shop-houses also in Taman Bijaya (the second contract). The face value of this contract was just over RM1.6 million.

Both these contracts were more or less in common form. Clause 5 of each contract provided that Bijaya would pay Trio for work done in periodic instalments according to the progress work done to the satisfaction of Bijaya. Clause 13 provided for disputes to be referred to the architect, Lee Eng Tong as sole arbitrator.

Trio was engaged at all times material to this petition on other building contracts with Chi Liung Realty (M) Sdn. Bhd. (Chi Liung). One of these contracts was for two blocks of 5-storey low-cost flats at Jalan Kim Chuan, Pandamaran (the third contract).

It is common ground that Chi Liung and Bijaya are related companies. It is also accepted by Bijaya that Chi Liung was its project manager for the first and second contracts. Trio consequently dealt with Chi Liung acting on behalf of Bijaya and took instructions from Chi Liung.

After the implementation of these contracts Chi Liung and Bijaya obviously ran into difficulties. Around the latter part of March 1987 Chi Liung wrote to Trio under the caption of all three contracts. They asked work on Taman Bijaya to be slowed and work on Jalan Kim Chuan to be speeded up.

The subsequent correspondence shows that it was in the normal course of business for all three contracts to be lumped and dealt with together and on 16 April 1987 Trio found it necessary to complain in writing to Chairman/managing director Dato' Harry Tong that as at 31 March 1987 over RM1.2 million was overdue in progress claims, and non-payment was causing severe cash flow problems. This led to some negotiations between the parties.

A letter dated 8 September 1987 written by Trio to Chi Liung proves conclusively that these negotiations led to a concluded written agreement because it is signed by Chi Liung. For the third contract it was agreed to pay RM165,405.02 before 15 September 1987. As regards the 1st and 2nd contracts there was a specific agreement that "the outstanding balance of RM791,547.14 ... be released ... in six monthly instalments commencing 15 January 1988 to 15 June 1988 with the amount of RM131,924.52 at each instalment."

This is a categoric acknowledgment of an existing debt by Bijaya's project manager made on its behalf and a binding promise. There was no suggestion whatsoever at that point in time that these works were not to the satisfaction of Bijaya.

On 6 June 1988 Trio wrote to Bijaya pointing out that the certified value of work done for the first and second contracts of RM791,547.14 (excluding retention of sum of RM177,580) was long overdue. But no payment was forthcoming. A further letter by Trio on 19 January 1989 asking for payment had no effect either.

In a letter signed by Mr. Chong Kian Nam for Bijaya to Mr. Lee Eng Tong dated 26 April 1989, Bijaya again confirmed that there was due from them to Trio RM697,508.86 excluding the retention sum of RM181,142.50.

It is to recover these amounts that Trio's solicitors sent a statutory demand, under s. 218 of the Companies Act on 11 August 1989. When payment was not forthcoming they filed this petition on 28 September 1989 in this Court.

To stave off the prospect of the winding-up petition, Bijaya filed an Originating Summons No. R8-24-89 in the High Court at Kuala Lumpur claiming that a dispute having arisen under the first and second contracts the Court should make an order that Lee Eng Tong be appointed arbitrator. I was informed from the Bar table that this application had been dismissed by the Senior Assistant Registrar on 22 November 1989 in Kuala Lumpur. Mr. G.T. Rajan intimated that an appeal had been filed against the Senior Assistant Registrar's decision in Kuala Lumpur which was pending. No attempt had been made on Bijaya's behalf to consolidate the application in Kuala Lumpur with the petition before me. Indeed there is no reference whatsoever in the Kuala Lumpur proceedings to the petition for winding-up although it is abundantly clear that it was filed on 23 August 1989 after the statutory letter of demand had been received.

In this Court, Bijaya filed a summons-in-chambers on 18 October 1989 praying for a stay of this winding-up petition on the ground that an application was pending in the Kuala Lumpur High Court for the appointment of an arbitrator to go into disputes arising under the contracts. It was suggested that Bijaya had a counterclaim against Trio for unlawfully stopping work on the contracts and before me it was claimed that the works executed by Trio had not been performed to the satisfaction of Bijaya under Clause 5 of the contracts.

As I just observed the application in KL had been dismissed. Before this Court what I had to decide was whether there was sufficient evidence that this company was unable to pay its debts and whether there was a genuine dispute which existed as to the debt claimed by Trio.

In all the circumstances of this case I was satisfied that Trio was claiming for a debt which Bijaya by its accredited agents had acknowledged full liability for. Furthermore Bijaya had under its own hand admitted to the arbitrator that the money claimed was due to Trio. Consequently there was no genuine dispute to be referred to arbitration and the money had to be paid.

That there is ample evidence that Bijaya cannot pay its debts as and when they fell due or at all is manifested by the fact that Bijaya could not offer security in terms acceptable to the petitioner for the payment of this claim and an admission by respondent's Counsel that Bijaya had severe cash flow problems. To say that they had tangible assets valued in excess of their debts is to miss the point. Winding-up orders are made precisely because the company's liquidity do not permit the payment of their debts as and when they fell due.

Consequently there was no grounds on which I could in justice make the order for a stay. It followed that an order in terms of the petition to wind-up has to be made as a matter of course with costs.

Also found at [1992] 1 CLJ 218